

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BRENDA A. CORBETT**

Claimant

VS.

**LINENS N THINGS**

Respondent

AND

**LIBERTY MUTUAL FIRE INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,046,516

**ORDER**

Respondent appeals the August 18, 2009, preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded benefits in the form of medical treatment for her right knee with orthopedic surgeon Brett E. Wallace, M.D., for an injury which occurred on July 18, 2003.

Claimant appeared by her attorney, Gary E. Laughlin of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, John David Jurcyk of Roeland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held August 17, 2009, with attachments; and the documents filed of record in this matter.

**ISSUES**

1. Did claimant file a timely application for hearing pursuant to K.S.A. 44-534(b) for an accident which occurred on July 18, 2003, when the E-1, Application for Hearing, was not filed until July 14, 2009?
2. Did the E-1 filed on July 14, 2009 constitute timely written claim under K.S.A. 44-520a?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed and benefits denied.

It is undisputed that claimant suffered an accidental injury to her right knee on July 14, 2003, when her foot slipped off a ladder. Claimant was diagnosed with a possible ACL tear in the right knee. Claimant was referred to Dr. Wallace and provided conservative care, including physical therapy and pain medication for several months. On November 13, 2003, Dr. Wallace provided a letter confirming that claimant had reached maximum medical improvement (MMI). Claimant had been released from medical treatment on October 15, 2003, without the need for additional treatment. Claimant was returned to her regular work without restrictions and assessed a 9 percent impairment to the right lower extremity, pursuant to the fourth edition of the *AMA Guides*.<sup>1</sup> The letter of November 13, 2003, stated that claimant had been discharged without a return visit being needed.<sup>2</sup>

By letter of December 23, 2003, respondent and its insurance company offered to settle claimant's claim based on the 9 percent rating provided by Dr. Wallace. The letter from Karen Moenkhoff, Sr. Claims Manager for Liberty Mutual Fire Insurance Company, stated that the offer "is valid for 30 days at which time I will close my file".<sup>3</sup> The offer of settlement involved a full and final settlement of the claim. Claimant rejected the offer of settlement as it involved the closing of her file and waiving possible future medical treatment on the knee.

Claimant testified that her knee did not heal fully. It continued to give her trouble, coming out of place with a quick turn. This also caused claimant immediate pain in the knee. The knee became worse with time and, in 2009, claimant attempted to return to Dr. Wallace for added medical treatment. Dr. Wallace then contacted the insurance company seeking authorization for the treatment of claimant's right knee. Ms. Moenkhoff, by letter of May 8, 2009, authorized one visit for the purpose of an evaluation, but expressly denied any treatment for claimant's knee.<sup>4</sup> Claimant then filed her E-1, Application For Hearing, with the Division of Workers Compensation (Division) on July 14, 2009. Claimant sought no medical treatment nor filed any documents with respondent or the Division between 2003 and 2009.

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>2</sup> P.H. Trans., Cl. Ex. 2.

<sup>3</sup> P.H. Trans., Cl. Ex. 4.

<sup>4</sup> P.H. Trans., Cl. Ex. 3.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534(b) states:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

K.S.A. 44-557(c) states:

No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

Claimant suffered an accidental injury which arose out of and in the course of her employment with respondent on July 18, 2003. Claimant was provided medical treatment and released on October 15, 2003, with a release to regular duty on October 16, 2003, and no more medical treatment contemplated by her treating physician. Claimant sought no additional medical care until 2009. On July 14, 2009, claimant filed her E-1 for the July 2003 accident. K.S.A. 44-534(b) limits the time available for a claimant to file the E-1 in a workers compensation situation. At first blush, it appears that claimant is beyond the three-year time limit in the statute. However, the Kansas Court of Appeals analyzed the statute in *Burnside*<sup>5</sup>, where the claimant suffered an injury on April 2, 1981, and did not file the E-1 until September 13, 1994. The Court in *Burnside* noted that the respondent had failed to file an accident report with the Director of Workers Compensation. The Court went on to find that the failure of respondent to file the accident report resulted in the statute of limitations in K.S.A. 44-534(b) not beginning to run until such time as the accident report is actually filed. Here, as no accident report was ever filed, the statute did not run. Therefore, claimant's E-1 filed on July 14, 2009, was timely, pursuant to K.S.A. 44-534(b) and K.S.A. 44-557(c).

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<sup>5</sup> *Burnside v. Cessna Aircraft Co.*, 24 Kan. App. 2d 684, 951 P.2d 1315 (1998).

K.S.A. 44-520a states:

(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

(b) Where recovery is denied to any person in a suit brought at law or in admiralty or under the federal employers' liability acts to recover damages in respect of bodily injury or death on the ground that such person was an employee and the defendant was an employer subject to and within the meaning of the workmen's compensation act, or when recovery is denied to any person in an action brought under the provisions of the workmen's compensation law of any other state or jurisdiction on the ground that such person was an employee under and subject to the provisions of the workmen's compensation act of this state, the limitation of time prescribed in subsection (a) of this section shall begin to run only from the date of termination or abandonment of such suit or compensation proceeding, when such suit or compensation proceeding is filed within two hundred (200) days after the date of the injury or death complained of.

Respondent also argues that claimant has failed to provide timely written claim in this matter. Claimant is allowed 200 days from the last payment of compensation to provide written claim for compensation. If no accident report is filed, the time limit is expanded to one year from the last payment of compensation. As no accident report was filed in this matter, the time for providing timely written claim would be one year from October 29, 2003, the last date physical therapy was provided to claimant. According to the record, claimant presented no writing to respondent or its insurance carrier before filing the E-1 on July 14, 2009.<sup>6</sup> As claimant's written claim, in the form of the E-1, was not filed until 2009, the filing would be out of time. Therefore, the award of benefits by the ALJ should be reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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<sup>6</sup> *Childress v. Childress Painting Co.*, 226 Kan. 251, 597 P.2d 637 (1979).

<sup>7</sup> K.S.A. 44-534a.

**CONCLUSIONS**

Claimant has proven that her filing of the E-1 satisfied the requirements of K.S.A. 44-534(b). The Order of the ALJ is affirmed on that issue. However, claimant has failed to prove that she provided timely written claim under K.S.A. 44-520a. The Order of the ALJ awarding claimant compensation is reversed due to claimant's failure to provide timely written claim to respondent.

**DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated August 18, 2009, should be, and is hereby, reversed due to claimant's failure to provide timely written claim to respondent for the accident occurring on July 18, 2003.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2009.

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HONORABLE GARY M. KORTE

c: Gary E. Laughlin, Attorney for Claimant  
John David Jurcyk, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge